(2)

No. 02-355

Supreme Court, U.S.
FILED
OCT 21 200
CLERK

In the Supreme Court of the United States

SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC.,
Petitioner,

v.

PETER VEECK d/b/a REGIONAL WEB,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, THE NATIONAL BOARD OF BOILER AND PRESSURE VESSEL INSPECTORS, AND AMERICAN CONCRETE INSTITUTE, *AMICI CURIAE*, SUPPORTING PETITIONER

EDWARD A. MATTO
ELIZABETH H. WATTS
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
(614) 227-2300

RICHARD A. GAFFIN
THOMAS C. PHILLIPS
Miller, Canfield, Paddock & Stone, P.L.C.
99 Monroe Avenue, N.W.
Suite 1200
Grand Rapids, MI 49503
(616) 454-8656

GLORIA C. PHARES
Counsel of Record
SHAWN V. MOREHEAD
Patterson, Belknap, Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

STEVEN C. CHAREN
562 Hudson Street
New York, NY 10014
(212) 243-1027

Attorneys for Amici Curiae

25 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the *Amici Curiae*	1
1. *Amici curiae*	1
2. Copyright revenues	5
3. The creation of voluntary consensus standards	6
4. Wide availability of *amici curiae*'s codes and standards	7
5. Widespread public and private use of codes and standards	8
Reasons for Granting the Petition	10
I. The Fifth Circuit's Decision Jeopardizes Public Safety	10
II. The Fifth Circuit's Decision Ignores the Purpose and Plain Language of the Copyright Act, Creates a Split Among the Circuits, and Would Lead to Non-Uniform Standards Nationwide.	12
A. The Fifth Circuit's Decision Ignores the Purpose and Plain Language of the Copyright Act.	12

Contents

Page

B. The Fifth Circuit's Decision Creates a Conflict Among the Circuits. 15

C. The Fifth Circuit's Decision Will Lead to A Lack of Uniform Standards, Interfering With Interstate Commerce. .. 18

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Banks v. Manchester, 128 U.S. 244 (1888) 15, 16

Building Officials & Code Administrators v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980) 15

CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc., 44 F.3d 61 (2d Cir. 1994) .. 15, 17

Hart v. Dan Chase Taxidermy Supply Co., 86 F.3d 320 (2d Cir. 1996) 17

Kregos v. Associated Press, 937 F.3d 700 (2d Cir. 1991) 17

Mazer v. Stein, 347 U.S. 201 (1954) 13

Authorities

Page

Practice Management Information Corp. v. American Medical Ass'n, 121 F.3d 516, *amended on other grounds*, 133 F.3d 1140 (9th Cir. 1998) 16, 17

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 15

United States Constitution:

U.S. CONST. amend. V, cl. 5 15

U.S. CONST. art. I, § 8, cl. 8 12

Statutes and Rules:

National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996) 18

17 U.S.C. § 106 (1994) 12

17 U.S.C. § 201(e) (1994) 14

U.S. Sup. Ct. R. 37(2)(a) 1

U.S. Sup. Ct. R. 37.6 1

Authorities

Page

Legislative and Executive Materials:

H.R. REP. No. 104-390 (1996) *reprinted in* 1996 U.S.C.C.A.N. 493 12

OMB Circular No. A-119, 63 Fed. Reg. 8545 (revised 1998) 18

Other Authorities:

MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (1996) 17

WILBUR CROSS, THE CODE: AN AUTHORIZED HISTORY OF THE ASME BOILER AND PRESSURE VESSEL CODE (1990) 1, 2, 19

The American Society of Mechanical Engineers, The National Board of Boiler and Pressure Vessel Inspectors, and the American Concrete Institute submit this brief as *amici curiae* in support of the Southern Building Code Congress International, Inc.'s petition for a writ of certiorari. The parties to the action have given their written consent to the filing of this brief pursuant to Rule 37(2)(a) of the Rules of this Court. The letters of consent have been filed with the Clerk.[1]

INTEREST OF THE *AMICI CURIAE*

1. ***Amici curiae.*** Although different in some respects, The American Society of Mechanical Engineers ("ASME"), The National Board of Boiler and Pressure Vessel Inspectors ("National Board"), and the American Concrete Institute ("ACI") are all not-for-profit organizations whose members volunteer to produce design, construction, and inspection codes. By adopting these codes into regulations and laws, the individual states and federal government have effectively endorsed the voluntary consensus standards developed by these organizations as the most effective way to create uniform standards in design, construction, and inspection that protect the American public and enhance interstate commerce.

a. On March 2, 1854, a boiler exploded at the Fales and Gray Car Works in Hartford, Connecticut. Destroying the boiler room and the adjoining blacksmith shop and shattering the main building, the explosion killed 21 people and injured more than 50 others. The coroner's jury that investigated the explosion concluded that regulations should be devised to require the regular safety inspection of boilers and to prevent the careless or inexperienced operation of boilers. Despite this devastating accident, the jury's recommendations went unheeded and boiler explosions continued.[2] In 1911, in response to the continuing

---

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was written, produced, and funded exclusively by *amici curiae* or their counsel.

2. WILBUR CROSS, THE CODE: AN AUTHORIZED HISTORY OF THE ASME BOILER AND PRESSURE VESSEL CODE 23, 29 (1990).

loss of life and property and to the need for standardization across political jurisdictions, ASME appointed a committee to write the organization's first Boiler Code. After almost four years of drafting, revision, and discussion, ASME published the first Boiler Code in 1915.[3]

ASME is a not-for-profit scientific, educational and technical organization for mechanical engineering, which was founded in 1880. It is a membership organization with over 125,000 individual members internationally. It has no corporate members. ASME serves several important functions, one of which is the development and maintenance of voluntary codes and standards associated with the art, science and practice of mechanical engineering.

ASME promulgates and publishes approximately 600 codes and standards addressing a broad range of topics related to mechanical engineering. ASME codes and standards include the Boiler and Pressure Vessel Code, the Elevator and Escalator Code, standards relating to turbines, cranes and pipelines, performance test codes, and standards as mundane as size dimensions for nuts and bolts, which enable interchangeability.[4] In addition, ASME operates related conformity assessment programs.

More than 100 principal standards committees operate within ASME, as well as hundreds more subcommittees, task groups and other sub-tier groups, with 3,600 volunteer participants and a full time codes and standards staff of nearly 100. Maintenance of ASME's standards is an ongoing process, requiring the consideration of new and advanced technologies and the enhancement of public health and safety. Over 1,000 committee and sub-tier group meetings are held each year as part of the extensive process of maintaining and updating ASME's codes and standards. It has been estimated that the

---

3. *Id.* at 35-42.

4. All of these codes and standards are "voluntary consensus standards" described *infra*, at pp. 6-7. For purposes of this brief only, the terms "codes" and "standards" are used interchangeably.

members donate approximately $26 million of their time each year to drafting, revising and maintaining ASME's codes and standards.

The Boiler and Pressure Vessel Code ("BPVC") is ASME's most widely used code. The BPVC addresses components and new construction of pressure retaining equipment, including boilers, so that such equipment can be operated safely without undue danger of explosion. It sets specifications for heating boilers in places of public assembly, such as hospitals, schools and churches, as well as in multiple dwellings, and for pressure equipment in any kind of facility, from electric power generation plants, including nuclear plants, to chemical and oil refineries, to naval ships, to dry cleaning stores. The BPVC now consists of eleven specialized sections, further subdivided into 28 specialized volumes, with the most recent version being over 17,600 pages long. More than 950 individual professionals participate in maintaining the BPVC, including metallurgists, designers, manufacturers, insurance inspectors, users such as the power and petroleum industry, and independent consultants. In addition, 55 representatives of state and local governments, including members of *amicus* the National Board, participate in maintaining the BPVC. ASME has registered its copyrights in the BPVC and in all of its other 594 codes and standards.

b. The National Board was created in 1919 to promote greater safety for life and property through uniformity in the construction, installation and inspection of boilers and pressure vessels. Its membership comprises the Chief Boiler Inspectors of the 49 states, 12 Canadian provinces, and several municipalities that have adopted ASME's BPVC or other codes or standards acceptable to the National Board as a regulatory requirement. In addition to participating in the maintenance of ASME's BPVC, the National Board commissions and qualifies Authorized Inspectors (employed by governmental enforcement authorities, insurance companies, and owner/user inspection organizations), and it administers the process of third-party inspection of boilers and pressure vessels during the construction

process. In 1921, the National Board began registering all pressure vessels and boilers approved by an Authorized Inspector commissioned by the National Board. In the fiscal year 2001, the National Board registered 123,132 boilers, 1,177,598 pressure vessels, and 1,849 nuclear-power related components.

The National Board also publishes model boiler laws, rules and regulations such as NB-131 (entitled "Recommended Boiler and Pressure Vessel Safety Legislation") and NB-132 (entitled "Recommended Administrative Boiler and Pressure Vessel Safety Rules and Regulations"). The National Board Inspection Code ("NBIC") is a standard recognized worldwide for in-service inspection, repairs and alterations of boilers and pressure vessels. Twenty-six experts and members of the National Board provide input into the various codes that it creates and maintains. The National Board has registered copyrights for all of its codes.

c. ACI is a non-profit scientific and educational society organized in 1904 to represent the user interest in the concrete field. ACI has over 16,000 individual members. ACI supports over 100 technical committees, which currently produce more than 400 technical documents, reports, guides, specifications, and codes related to concrete technology and its applications. The committee members give approximately $10 million of volunteer time each year to drafting, revising, and maintaining ACI's technical documents, including codes. All of ACI's technical documents are reviewed at least every five years and are revised and reissued when necessary. ACI publishes and maintains four consensus documents: (1) ACI 318, Building Code Requirements for Structural Concrete, which governs the design and construction of structural concrete in buildings and is the source document for all United States concrete construction; (2) ACI 349, Code Requirements for Nuclear Safety Related Concrete Structures, which is referenced by licenses issued by the Federal Nuclear Regulatory Commission; (3) ACI 350, Code Requirements for Environmental Engineering Concrete Structures, which applies to the design and construction of concrete structures in the water

infrastructure, such as potable water tanks and water treatment facilities; and (4) ACI 530, Building Code Requirements for Masonry Structures, which governs the design and construction of concrete and clay masonry buildings. The Committee overseeing the 318 Code has 76 members, including architects, engineers and academics who spend approximately 8,572 person-hours annually developing the Code, or about $2 million of volunteer time. In addition, ACI administers a national training and certification program for concrete technicians, inspectors, and workers. ACI has registered its copyrights for all its documents, including its codes.

Although each of the *amici curiae* operates independently, some of their activities are interrelated when they set standards relating to different aspects of the same equipment. ASME, for example, focuses on the original design, manufacture, and construction of boilers and pressure vessels, while the National Board standards apply to installation, maintenance, and repair of the same equipment. National Board members serve on ASME code committees representing their jurisdictions' interests, and National Board staff employees also serve on ASME code committees representing general interests. ASME and ACI have jointly developed those portions of the BPVC relating to the design and construction of concrete reactor vessels and containments used in nuclear power plants.

2. **Copyright revenues.** Despite the extensive voluntary participation by experts in developing ASME's, ACI's, and the National Board's codes, these private, not-for-profit organizations incur significant expenses in connection with code development. These expenses are covered by revenue derived to a large extent from ASME's, ACI's and the National Board's publication and sale of these codes and standards. In the fiscal year ending June 30, 2001, the sale of ASME's copyrighted codes and standards generated one-third of ASME's total revenues. ACI's 318 Code generated ten percent of ACI's total revenues in 2001; all ACI codes and standards were responsible for one-third of ACI's total revenues. The National Board

likewise derives a significant portion of its revenue from the sale of its codes and standards. This revenue allows the National Board to continue to offer its extensive training program involving continuing education in various disciplines of the boiler and pressure vessel industry, to operate a pressure relief device testing laboratory and to maintain detailed records of all National Board registered boilers and pressure vessels. Absent the revenue generated by the publication of their codes and standards, the not-for-profit ASME, ACI and the National Board would be unable to support the drafting and maintenance of these uniform, expert codes. Their membership fees and other sources of revenue alone could not support the process.

3. **The creation of voluntary consensus standards.** ASME's codes and standards, the National Board's NBIC, and ACI's codes are all voluntary consensus standards. ASME, ACI and the National Board develop these codes through a consensus process by committees composed of several different interest groups — a process accredited by the American National Standards Institute.[5]

Three principles govern the creation and maintenance of voluntary consensus standards: openness, lack of dominance, and due process. Drafting and maintenance of the standards are open; any person who is directly and materially affected by a voluntary consensus standard may participate. To ensure that no single interest group dominates the drafting and maintenance of voluntary consensus standards, each organization has devised guidelines that require balance among the interested constituencies. For example, ASME prohibits any interest category (*e.g.*, manufacturer, designer/constructor, owner/operator, jurisdiction/enforcement agency) from constituting

---

5. The American National Standards Institute is a private, non-profit organization that administers and coordinates the U.S. voluntary consensus standards system. The Institute's mission is to enhance both the global competitiveness of U.S. business and the U.S. quality of life by promoting and facilitating voluntary consensus standards systems, and safeguarding their integrity.

more than one-third of a committee dealing with safety. Finally, to provide due process, any person with a direct and material interest in a standard has a right to have his or her position considered by the committee during a period of public comment and has the right to appeal the committee's determination.

4. **Wide availability of *amici curiae*'s codes and standards.** Once a new version or revision of ASME's, the National Board's, or ACI's codes has been finalized through these voluntary consensus procedures, ASME, ACI or the National Board publishes and sells the new version or revision.

For example, a new version of ASME's entire BPVC, now 28 volumes, is published every three years, and ASME distributes updates annually. A company or practicing professional working in a specialized area covered by the BPVC may obtain a copy of the applicable volumes, as well as ASME's other codes and standards, in any of several ways. ASME distributes a catalog of its publications annually and publishes information about its codes and standards or its website at www.asme.org. Users of the BPVC may order a copy of pertinent volumes or the entire BPVC, in print or electronic format, by writing to ASME, calling a toll-free number, or sending a fax or e-mail. In jurisdictions where ASME is aware that the BPVC has been adopted by reference, ASME provides a complimentary copy of the BPVC to the relevant government entity. It is also generally available in university engineering libraries. Virtually no company or practicing professional uses the entire BPVC; for example, those not involved with nuclear facilities have no need for any of the eleven volumes relating to such facilities and those involved solely with unfired pressure vessels have no need for volumes relating to power or heating boilers. Recognizing that most users do not need the entire BPVC, ASME sells copies of separate specialized volumes of the BPVC, ranging in cost from $155 to $410. Other ASME codes and standards are similarly readily available to the specialized professional audiences that use them.

The NBIC and other National Board codes and regulations are sold at reasonable prices to anyone, but are purchased primarily by those in the industry. A print copy of the NBIC is available for $85, and a CD-ROM version is also available at a higher cost. Public access to these codes has been provided successfully in this way since 1919. Information relevant to the codes, updates, and supporting documents are available at the National Board website which is found at www.nationalboard.org. The National Board distributes approximately 10,000 copies of its codes each year.

Since 1956, major revisions of ACI's code documents have typically been completed every six years. ACI makes its codes available in both print and electronic formats, which can be purchased in technical and university bookstores as well as directly from ACI at its website, www.concrete.org. The 2002 version of ACI's Building Code Requirements for Structural Concrete comprises 443 pages and is available directly from ACI for $141.50 for non-members. ACI distributes approximately 12,000 copies of its codes each year.

5. **Widespread public and private use of codes and standards.** ASME's, ACI's, and the National Board's codes and standards are written for the benefit of many entities beyond their membership — some public, some private.[6] The codes and standards developed by ASME, ACI, and the National Board are followed widely, in part because of the significant contributions of the many experts who work to maintain them and because of the voluntary consensus procedures they employ. Insurance companies rely on the past safety records of equipment built to standards in writing insurance, resulting in lower premiums, which benefit insureds. Manufacturers use the codes and standards to develop and market standardized, safe products

---

6. Reliance on the codes and standards is not confined only to the United States. ASME's BPVC is accepted in 80 countries worldwide. The National Board's NBIC is recognized worldwide and is indeed the only standard of its type with such recognition. ACI's 318 Code serves as the basis for building codes in several other countries.

that can be shipped into and used in all jurisdictions without the increased costs of modifying equipment to meet varying requirements.[7] Institutions that operate boilers and pressure vessels rely on the NBIC in connection with their maintenance, repair, and alteration. Concrete design, construction, and repair and maintenance professionals throughout the United States rely on ACI code requirements.

In addition to these private sector users, many government entities have chosen to take advantage of these expertly developed codes and standards. United States government agencies reference 89 ASME standards in the Code of Federal Regulations.[8] State and local governments also have adopted multiple ASME standards; for example, the New York Department of State references 54 ASME standards. The BPVC has been adopted, in whole or in part, as a regulatory requirement by 49 states and all Canadian provinces, is widely used by multiple agencies of the U.S. government, is accepted in more than 80 countries, and is used by manufacturers accredited under ASME's related conformity assessment program in 65 countries.

---

7. The BPVC fosters interstate and international commerce because all U.S. and Canadian jurisdictions adopting the BPVC agree to accept equipment certified to have been built in compliance with it. In addition, 30 years ago ASME opened its BPVC conformity assessment program to manufacturers outside of North America and currently accredits manufacturers in 65 countries as being capable of producing equipment or components in compliance with specific BPVC sections.

8. Federal agencies and departments as varied as the Architectural and Transportation Barriers Compliance Board, the Department of Defense, the Department of Energy, the Department of Housing and Urban Development, the Department of the Interior, the Department of Transportation, the Environmental Protection Agency, the Mine Safety and Health Administration, the Nuclear Regulatory Commission, the National Aeronautics and Space Administration, the Occupational Health and Safety Administration, the U.S. Coast Guard, the U.S. General Services Administration, and the U.S. Postal Service reference ASME standards in their regulations and procurement procedures.

The NBIC is accepted in all 50 United States and all the Provinces of Canada, and by the U.S. Department of Transportation, which regulates, among other things, over-the-road pressure vessels that carry compressed gases on interstate highways. The laws of several states contain references to codes created by the National Board: many state accreditation programs require NBIC accreditation in order to implement repairs on nuclear plants; at least 35 states and two cities have laws with requirements for repair of safety relief devices; and at least 34 states and two cities have requirements for the repair of boilers and pressure vessels.

ACI's 318 and 530 Codes are adopted by reference by the state, county, and city building codes of all 50 states. All nuclear power facilities must have a license approved by the Federal Nuclear Regulatory Commission. These licenses reference ACI's 349 Code for the design and construction of safety-related concrete structures.

The private and government entities that use ASME's, ACI's, and the National Board's codes and standards benefit from the expertise that goes into developing them and from their widespread acceptance. The Fifth Circuit's decision threatens the near century of private and public cooperation that has fostered the development of these codes and standards and advanced public safety in commerce unhindered by jurisdictional barriers. Without these uniform codes and standards, all of these entities would face the same intolerable chaos boiler manufacturers faced before 1915.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision Jeopardizes Public Safety

The Fifth Circuit's decision, if allowed to stand, would jeopardize the safety of people who live, work, and play in buildings constructed with concrete or that contain boilers or pressure vessels — namely the entire public. Over the last century, private entities such as ASME, ACI, and the National Board, and public entities have cooperated to develop and implement codes and standards that promote safety and

streamline commerce. This system of code development and implementation has been sustained by the revenue derived from the authors' copyrights.

The Fifth Circuit's decision would deprive private non-profit entities such as ASME, ACI, and the National Board of the copyright of any code or standard when it is adopted by any governmental entity. It would thus permit unlimited third-party publication, including free worldwide distribution on the Internet. As a result, the code and standards-setting organizations would lose the revenue earned from sales of copies of those codes. The revenues generated by these endangered copyrights cover the expenses incurred in developing and maintaining these codes. Without those revenues, these not-for-profit codes and standards-writing organizations would no longer be able to develop and maintain their codes and standards.

Absent the efforts of private code-drafting organizations, the federal government, states, and municipalities would be faced with the daunting task of developing their own codes and standards for boilers, pressure vessels, concrete structures, as well as numerous other items. Although these governmental entities may have an adequate incentive to produce these codes — namely the obligation to ensure the safety of their constituents — they would be unable to deploy the same extensive resources as organizations created by experts in the field for this purpose, such as ASME, ACI, and the National Board. Private code-drafting organizations whose codes are widely followed are able to spread the costs of code development among users throughout the world; individual jurisdictions may not be able to share costs so efficiently. Nor would individual jurisdictions be able to collect the breadth of expert input achieved by private national entities. Moreover, codes developed by political bodies are likely to be subject to lobbying efforts of interested parties. They are less likely to have the benefits of the voluntary consensus procedures followed by ASME, the National Board, and ACI, which are specifically designed to provide the best technical solutions without dominance by any one interested party.

The end result would likely be a multitude of local codes and standards that are devised with less expert care and with more attempts by interested parties to enact codes that benefit their private interests rather than the public at large. As the House Report on the National Technology Transfer and Advancement Act recognized, "[t]his unique consensus-based voluntary system has served us well for over a century and has contributed significantly to United States competitiveness, health, public welfare and safety." H.R. REP. No. 104-390, at 24 (1996) *reprinted in* 1996 U.S.C.C.A.N. 493, 510. The Fifth Circuit's decision stands poised to undo these significant contributions to public welfare and safety by depriving voluntary consensus standard-writing organizations of the economic incentive for drafting codes and standards — their copyright revenues.

II. The Fifth Circuit's Decision Ignores the Purpose and Plain Language of the Copyright Act, Creates a Split Among the Circuits, and Would Lead to Non-Uniform Standards Nationwide.

A. The Fifth Circuit's Decision Ignores the Purpose and Plain Language of the Copyright Act.

The Copyright Act encourages the creativity of authors by granting them an economic incentive in the form of a copyright for a limited period of time. *See* 17 U.S.C. § 106 (1994). No one disputes that ASME, ACI, the National Board and similar organizations acquire copyrights in their codes and standards; these organizations are authors of the original expression embodied in their codes and standards and are entitled to the lawful monopoly created by the Copyright Act in furtherance of the goal of the Constitution's Copyright Clause. U.S. CONST. art. I, § 8, cl. 8.

The revenues generated by ASME's, ACI's and the National Board's publication of their copyrighted codes and standards provide these not-for-profit organizations the economic support to create and maintain their codes and standards. The revenues generated by ASME's copyrights constitute one-third of ASME's total annual revenues. Likewise, revenue generated from the

sale of the National Board's NBIC is significant and fundamental to its operations. ACI's copyrights are the basis for one-third of ACI's total annual revenues. The Copyright Clause of the Constitution and the Copyright Act were adopted to create precisely this result. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. . . ." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). ASME's, ACI's, and the National Board's copyrights encourage the creative work of these organizations and thereby advance public welfare, just as the Copyright Clause envisioned.

The Fifth Circuit's decision would strip petitioner and other code-writing organizations such as ASME, ACI, and the National Board of the copyrights in their codes and standards. Under the Fifth Circuit's holding, when the federal government, a state, or municipality adopts into its laws or regulations a private, non-profit entity's codes or standards, that entity would lose its copyrights in those referenced codes and standards; the codes and standards would enter the public domain. Pet. App. 14a. Because ASME's, ACI's or the National Board's codes are incorporated by reference in federal regulations and in the statutes of all the states, the Fifth Circuit's ruling threatens their copyrights. As a result of the loss of income from their copyrights, ASME, ACI, the National Board and similar organizations would be forced to discontinue their code drafting and maintenance. The economic incentive created by the Copyright Act would no longer be available to them as a result of governmental adoption and the Fifth Circuit's decision.

The Fifth Circuit states that because codes and standards are developed so that they may be used by governments, the private, non-profit code writing organizations that develop them are not entitled to their copyrights. Pet. App. 25a. This statement is doubly flawed. First, codes and standards are not written solely for adoption by government entities. They are also intended

for use by the private sector to facilitate uniform design, construction, and inspection.

Second, although many standards-setting organizations promote the adoption of their codes by government entities, they do not thereby authorize governmental expropriation of their copyrights. Indeed, in some instances, jurisdictions reference privately authored codes without securing permission from, or even notifying, the code author.[9] And ACI's 318 Code is normally not adopted by a government's direct reference to the 318 Code, but rather because the 318 Code is referenced in a privately drafted model building code (such as petitioner's building code) that is in turn referenced by a government.

The Fifth Circuit's ruling dismisses the Copyright Act's plain language that

> When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, *no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership* with respect to the copyright, or any of the exclusive rights under a copyright, *shall be given effect* under this title, except as provided under [the Bankruptcy Act].

17 U.S.C. § 201(e) (1994) (emphasis added); Pet. App. 21a. None of the *amici curiae* has ever voluntarily transferred the copyrights or any of the exclusive copyright rights in their codes or standards. Thus, the plain language of the statute itself directly forbids the kind of expropriation of copyright — loss of copyrights by governmental adoption — that the Fifth Circuit's ruling endorses.

---

9. Florida referenced the 1996 version of ASME's Elevator and Escalator Code, even though a 2000 version was available. ASME learned of the Florida's reference only by observing the steady stream of sales of the 1996 version to Floridians.

Finally, the Fifth Circuit also failed to consider the constitutional limits on government expropriation established by the Takings Clause. U.S. CONST. amend. V, cl. 5. If a governmental entity's adoption by reference of a privately written code results in the loss of the author's copyright, as the Fifth Circuit has concluded, it unquestionably results in a "taking" of the property rights granted by the Copyright Act to the code author. *See CCC Info. Serv., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) ("For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution."). This constitutional issue could have been avoided had the Fifth Circuit ascertained whether it was "fairly possible," as it surely is, to construe the Copyright Act so as to avoid a taking. *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982).

B. The Fifth Circuit's Decision Creates a Conflict Among the Circuits.

The Fifth Circuit's decision to deprive private code-drafting entities of their copyrights upon reference by a government entity conflicts directly with decisions of the Second and Ninth Circuits, which confirmed the rights of private entities such as ASME, ACI, and the National Board to maintain and enforce their copyrights.[10]

The *en banc* majority of the Fifth Circuit disregarded the Copyright Act's purpose of creating an incentive for authors in the form of a copyright in their work. Claiming to rely on *Banks v. Manchester*, 128 U.S. 244 (1888), the *en banc* majority held that even where a private entity authors a code, once the code is

10. In *Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730, 735 (1st Cir. 1980), on which the Fifth Circuit also relied, the court explained that it could not say with "any confidence that the same policies applicable to statutes and judicial opinions may not apply to" privately authored codes. However, the court explicitly refused to make a final ruling on the issue at the preliminary injunction stage. *Id.* at 736.

adopted in federal, state, or local statutes or regulations, the privately authored code becomes "the law" and loses its copyright. Pet. App. 15a. But *Banks* recognized the importance of incentives to copyright. This Court, in holding that "no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their duties," relied on the fact that judges are paid from the public treasury and therefore "have no pecuniary interest . . . in the fruits of their judicial labors." *Id.* at 253; *see also Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 518, *amended on other grounds*, 133 F.3d 1140 (9th Cir. 1998) (noting that *Banks* rests in part on the ground that the public owns judicial opinions because the public pays the judges' salaries). The *en banc* majority of the Fifth Circuit gave no weight to this factual distinction between *Banks* and this case — that private, non-profit entities such as *amici*, unlike the publicly paid judges in *Banks*, do have a pecuniary interest in the codes and standards they create.

The *en banc* majority of the Fifth Circuit instead focused on language in *Banks* that suggested that judicial opinions should be "free for publication to all." Pet. App. 9a-11a. Reading a right to freely access and copy the law — without cost — into this language, the *en banc* majority found that references to privately authored codes were inconsistent with this right if the privately authored codes retained their copyrights. Therefore, the court held that such codes enter the public domain when they are referenced by governmental entities. Pet. App. 14a.

The Ninth and Second Circuits have not embraced the Fifth Circuit's reading of *Banks*. In *Practice Management*, 121 F.3d at 518, the Ninth Circuit considered the Physician's Current Procedural Terminology ("CPT"), a coding system for medical procedures created by the American Medical Association. In 1977, the federal Health Care Financing Administration ("HCFA") adopted regulations requiring applicants for Medicaid reimbursement to use the CPT. The plaintiff in *Practice Management* argued that, under *Banks*, the CPT entered the

public domain when HCFA required its use by regulation. The district court and the Ninth Circuit disagreed and held that federal adoption of the CPT did not result in forfeiture of the copyright because such a result would "'prove destructive of the copyright interest,' in encouraging creativity." *Id.* (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[C], at 5-92 (1996) ("NIMMER")). The Ninth Circuit also noted that there was "no evidence that anyone wishing to use the CPT has any difficulty obtaining access to it." *Id.* at 519.

The Second Circuit in *CCC Information Services* similarly declined to hold that a book of automobile valuations was stripped of its copyright when several states required insurance companies to use the valuations to determine minimum payments for the "total loss" of a vehicle. 44 F.3d at 74. Like the Ninth Circuit, the Second Circuit reasoned that such a loss of copyright would be "antithetical to the interests sought to be advanced by the Copyright Act." *Id.* (citing NIMMER § 5.06[C] at 5-60).[11] The Fifth Circuit, by ignoring the Copyright Act's purpose of creating an economic incentive for authors, contrary to the decisions of the Second and Ninth Circuits, has created chaos in the law.

The Fifth Circuit's decision has also led to uncertainty in the law by creating a right to freely access and copy the law without cost. Access to the law has never before been construed to mean access without cost. Just as there is no evidence that cost prevented respondent from gaining access to the SBCCI code at issue in the instant case, cost does not prevent anyone from gaining access to ASME's, ACI's, or the National Board's codes and standards. ASME's, ACI's and the National Board's

11. Further compounding the split among the courts of appeals is the fact that these courts do not all analyze the merger doctrine, one of respondent's copyright defenses, the way the Fifth Circuit did below. *Compare* the Fifth Circuit's approach, Pet. App. 16a-20a (treating merger as part of the analysis of copyrightability), *with Hart v. Dan Chase Taxidermy Supply Co.*, 86 F.3d 320, 322 (2d Cir. 1996), *CCC Info. Serv.*, 44 F.3d at 72 n.26, *and Kregos v. Assoc. Press*, 937 F.3d 700, 705 (2d Cir. 1991) (treating merger as part of the analysis of infringement).

codes are widely available for purchase on their websites, by telephone and by mail. They are also available for reading and copying at technical and university engineering libraries and government offices. Although not articulated, respondent is not really complaining that he was deprived of the ability to gain access to and use SBCCI's Building Code. Indeed the record shows that he had no difficulty buying a copy from SBCCI for himself. Instead, he is claiming the right to compete with SBCCI as a publisher of the code by posting it on his website.

C. The Fifth Circuit's Decision Will Lead to A Lack of Uniform Standards, Interfering With Interstate Commerce.

Congress has directed federal agencies and departments to use voluntary consensus standards such as those created by *amici*. *See* National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d), 110 Stat. 775, 782 (1996) (noted in Historical and Statutory Notes, 15 U.S.C.A. § 272 (West 1997)). Following that directive, the Office of Management and Budget pointed out that voluntary consensus standards "[e]ncourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards." OMB Circular No. A-119, 63 Fed. Reg. 8545, 8554 (revised 1998), available at www.whitehouse.gov/omb/circulars/a119/a119.html.[12] The decision of the *en banc* majority of the Fifth Circuit, if allowed to stand, will undermine the efficiency of interstate commerce, the benefits to public welfare created by these harmonized codes, and the codes and standards-writing organizations, such as *amici*, whose efforts have fostered those benefits.

Without national organizations such as ASME, ACI, and the National Board to promulgate and maintain codes and

---

12. The OMB circular expressly directs federal agencies: "If a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations." 63 Fed. Reg. 8545, 8555 (revised 1998).

standards, the federal government, states, and localities will be forced to create and update their own codes and standards for, among other things, the construction and maintenance of boilers, pressure vessels, concrete structures, and myriad other equipment such as elevators and escalators. Because each governmental entity will be forced to create its own codes, the codes could vary from state to state, county to county, and even town to town.

A Maryland manufacturer making a component for an electrical power generation plant that meets Maryland specifications could not be sure that the same component would comply with the specifications adopted by neighboring Virginia without further inspection, let alone know whether it would comply with the codes of the other 48 states. An architect in Anna, Texas might have to learn a different code for concrete structures if he or she wanted to design a structure to be built just a few miles away in Savoy. Similarly, a concrete column, slab, or beam that satisfied the strength requirements in California might be deemed inadequate in Arizona. And the lack of uniform standards would leave the insurance industry without benchmarks upon which to base premiums. But the Fifth Circuit decision would nonetheless deprive codes and standards writing organizations of copyright revenues necessary to continue their valuable work.

The inability to conduct business across jurisdictions was one of the primary reasons for the creation of the Boiler Code almost a century ago. As the introduction to the final 1914 drafts of ASME's first Boiler Code recognized, inconsistent laws and regulations of boilers from one area to another made interstate shipment of parts at that time almost impossible, creating "intolerable confusion." [13] Today manufacturers are able to design and manufacture products that conform with the BPVC and ship them to all 50 United States, Canada, and more than 80 other countries where the BPVC is accepted. Because insurance companies know the performance records of

13. CROSS, *supra* note 2 at 41.

equipment manufactured according to code and inspected by authorized inspectors, they can better assess the likelihood of loss and decrease the cost of insurance. Because of the wide adoption of ACI's 318 Code, architects and designers of concrete structures are able to design in many jurisdictions without studying multiple standards. The Fifth Circuit's decision not only creates chaos on an important issue of law by initiating a split among the circuits, it also would create chaos in industry and commerce by thwarting the efficiency and economic competition that the system of harmonized codes has created throughout the last century.

CONCLUSION

Amici urge this Court to grant petitioner's petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

EDWARD A. MATTO
ELIZABETH H. WATTS
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
(614) 227-2300

RICHARD A. GAFFIN
THOMAS C. PHILLIPS
Miller, Canfield, Paddock
& Stone, P.L.C.
99 Monroe Avenue, N.W.
Suite 1200
Grand Rapids, MI 49503
(616) 454-8656

GLORIA C. PHARES
Counsel of Record
SHAWN V. MOREHEAD
Patterson, Belknap, Webb
& Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

STEVEN C. CHAREN
562 Hudson Street
New York, NY 10014
(212) 243-1027

Attorneys for Amici Curiae

OCTOBER 2002